

ALERT

COMPENSATION AND EMPLOYEE BENEFITS

February 2009

New COBRA Changes Require Immediate Attention

As part of the recently enacted American Recovery and Reinvestment Act of 2009 (ARRA), employees who are involuntarily terminated from employment between Sept. 1, 2008 and Dec. 31, 2009 will be entitled to a premium subsidy for up to nine months of their COBRA continuation coverage. Under this provision, terminated employees (and their qualified beneficiaries) will only be required to pay 35 percent of the monthly COBRA premium, while the health plan (either a self-insured employer group health plan or an insurance company) will be able to obtain an employment tax credit equal to the remaining sixty-five percent of the monthly COBRA premium.

Because this new provision is already effective, administrators of group health plans will be required to take immediate action to comply with its requirements. Specifically, plan administrators will need to comply with new COBRA notice requirements and will need to address the new premium subsidy requirements as early as March 1, 2009.

Here are some common questions and answers regarding the new COBRA requirements under ARRA:

Which employees are eligible for premium assistance? An “assistance eligible individual” is any employee whose employment is involuntarily terminated between Sept. 1, 2008 and Dec. 31, 2009 and who is eligible for and elects COBRA continuation coverage. A dependent child or spouse of an involuntarily terminated employee who meets the definition of a qualified beneficiary under COBRA would also be eligible for this assistance. Individuals who become entitled to COBRA due to other qualifying events, such as voluntary terminations of employment, divorce or loss of dependent status, are not eligible for the subsidy. In addition, the subsidy phases out for individuals whose income exceeds certain amounts; however, this does not affect how the subsidy rules affect the plan (i.e., from the plan’s standpoint, the subsidy would still apply, but the Internal Revenue Service would recapture the subsidy from the employee by increasing the employee’s tax liability).

Does this transition assistance apply to smaller employers who are not subject to COBRA, but who have insured health plans that are subject to state continuation of coverage requirements?
Yes.

When does the premium assistance begin? The subsidy would apply to the first period of coverage (generally a month) beginning after Feb. 17, 2009, the effective date of ARRA during which the assistance eligible individual has COBRA coverage in effect.

How long does premium assistance last? An assistance eligible individual may receive the COBRA premium subsidy for a maximum period of nine months. However, premium assistance ends earlier if the maximum period of COBRA coverage expires earlier or the individual becomes eligible for coverage under another group health plan or Medicare. An assistance eligible individual is required to notify a plan of his or her eligibility for other group health plan coverage or Medicare. Tax penalties apply to individuals who fail to provide this notice.

What happens to an assistance eligible individual who suffered an involuntary termination of employment prior to the effective date of ARRA but does not have in effect COBRA coverage as of that date? If an employee was involuntarily terminated on or after Sept. 1, 2008, but either did not elect COBRA continuation coverage or elected continuation coverage but terminated that coverage prior to Feb. 17, 2009, he or she will have a new election period to enroll in COBRA coverage and obtain premium assistance. This election period begins Feb. 17, 2009 and ends sixty days after the plan administrator provides the individual with notice of his or her rights to this extended election period. If an assistance eligible individual elects COBRA coverage under this special election window, coverage would be effective as of the first period of coverage after Feb. 17, 2009 (generally March 1, 2009). However, that individual's maximum period of COBRA coverage would be determined as if the individual had timely elected COBRA coverage as of the original qualifying event.

What new notice requirements apply to plan administrators? There are two new notice requirements with which plan administrators must comply. First, assistance eligible individuals who incur a COBRA qualifying event after Feb. 17, 2009 must be provided notice of the right to premium assistance. This notice can either be included in the plan's general COBRA notice or can be provided as a stand-alone notice. Second, those assistance eligible individuals who incurred a qualifying event prior to Feb. 17, 2009 and are entitled to the special election rights described above must be provided a separate notice advising them of their rights to premium assistance.

What information is required to be included in these notices? Assistance eligible individuals must be provided with notice that includes the following: (1.) any forms necessary for establishing eligibility for premium assistance; (2.) the name, address and telephone number necessary to contact the plan administrator or any other person maintaining relevant information in connection with premium assistance; (3.) in the case of an assistance eligible individual who is entitled to the extended election period, a description of the extended election period and the deadline for making an election; (4.) a description of the individual's obligation to notify the plan that he or she is eligible for coverage under another group health plan or Medicare and the penalty for failure to provide this notice; (5.) a description, displayed in a prominent manner, of the individual's right to a reduced premium and any conditions on entitlement to the reduced premium; and (6.) a description of any option the individual has to enroll in a different coverage if the employer permits the individual to elect a different coverage option under the plan.

Is the premium subsidy available to an assistance eligible individual if the employer already subsidizes COBRA premiums? The premium subsidy is not available to an assistance eligible individual to the extent the employer subsidizes the cost of COBRA coverage. For example, if the employer provides COBRA continuation coverage to a qualified beneficiary free of charge, the employee is not eligible for premium subsidy and the employer is not eligible to obtain credit for sixty-five percent of the cost of the COBRA coverage.

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Employers are permitted, but not required, to offer assistance eligible individuals an opportunity to elect available coverage options under the plan other than the coverage option the employee has as of the qualifying event, without jeopardizing the employee's ability to receive the COBRA premium subsidy. However, the premium for this alternative coverage cannot exceed the premium for coverage in which the individual was enrolled at the time of the qualifying event.

Employers and plan administrators will need to take the following steps as soon as possible in order to ensure compliance with ARRA:

1. Identify all employees who may be assistance eligible individuals and who incurred an involuntary termination of employment on or after Sept. 1, 2008.
2. Contact their third party administrator, COBRA administrator and/or insurance company to allocate responsibility for complying with the various requirements of ARRA (most notably, the notice requirements).
3. Implement a procedure for handling receipt of COBRA premiums for periods beginning on or after March 1 for those individuals who may be assistance eligible individuals.

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